

EDITORIAL COMMENTS

HAS THE INTERNATIONAL COURT EXCEEDED ITS JURISDICTION?

arbiter nihil extra compromissum facere potest . . .
Justinian, *Digest* 4.8.32.21

On January 18, 1985,¹ the United States notified the International Court of Justice of its withdrawal from the proceedings in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*.² In its notice, the United States alleged that "the Court lacks jurisdiction and competence." It contended that "the Court's decision of November 26, 1984, finding that it has jurisdiction, is contrary to law and fact."³ The allegation invokes a venerable tradition in international arbitration and adjudication about the consequences of the exercise of excess jurisdiction by an international tribunal.⁴

I.

International tribunals are bodies of limited competence, empowered to adjudicate only those matters which have been submitted to them by the parties and only in the manner prescribed by their constitutive documents.⁵ When an international tribunal purports to act beyond the authority granted to it, its acts, like those of any other entity that exceeds its authority, are null and void. Practice and scholarship have developed and refined an itemization of grounds for nullification.⁶

¹ U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ, Department Statement, Jan. 18, 1985, DEP'T ST. BULL., No. 2096, March 1985, at 64.

² *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

³ Department statement, *supra* note 1, at 64.

⁴ See generally K. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* (1946); A. BALASKO, *CAUSES DE NULLITÉ DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC* (1938); J. WITENBERG, *L'ORGANISATION JUDICIAIRE, LA PROCÉDURE ET LA SENTENCE INTERNATIONALE* (1937); W. M. REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* (1971).

⁵ Classic statements were made in *Mavrommatis*, where Lord Finlay said, "The jurisdiction of the Permanent Court rests upon consent, and without consent there is no jurisdiction over any State." *Mavrommatis Palestine Concessions*, 1924 PCIJ, ser. A, No. 2, at 42 (diss. op. L. Finlay, J.). In the same case, Judge Moore stated:

Ever mindful of the fact that their judgments, if rendered in excess of power, may be treated as null, international tribunals have universally regarded the question of jurisdiction as fundamental. . . . The international judicial tribunals so far created have been tribunals of limited powers. Therefore no presumption in favor of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the record.

Id. at 60 (diss. op. Moore, J.).

⁶ In addition to the citations in note 4 *supra*, see Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, UN Doc. A/CN.4/92, at 105-10 (1955) (UN Pub. Sales No. 1955.V.1).

The practical problem in international law in implementing this elementary legal notion has been the general lack of political or judicial hierarchy. Hierarchies might supply another instance to review the assertion by the aggrieved party that the original tribunal had exceeded its jurisdiction. Without such a reviewing authority, there is the fear that the evil of *excès de pouvoir* will be more than matched by the evil of *judex in sua causa*.

Despite such concerns, it cannot be questioned that the demand for respect for constitutive instruments and, perforce, the sanction for violation of that respect prevail. The point can be demonstrated by examining a provision such as Article 36(6) of the Statute of the International Court (which is essentially declaratory of international arbitration law) and the way international law construes it. Article 36(6) provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Given the care and detail manifested by the preceding five paragraphs of Article 36 and the comparable care heretofore applied by the Permanent Court and the International Court in construing them, it would be absurd to contend that paragraph 6 empowers the Court to decide without regard to the law in question. The very word "Court" imports a decision based on the legal expectations of the parties, not on some judicial *cadenza*.

Any possible doubt about international legal thinking on this matter was dispelled when the General Assembly of the United Nations reviewed the International Law Commission's Draft Convention on Arbitral Procedure in 1952.⁷ The French version of Article 11, corresponding to Article 36(6) of the Statute of the International Court, described the tribunal "as the 'maître' of its own competence" and attributed to it "the widest powers to interpret the *compromis*." The Assembly objected to the breadth of that ascription⁸ and the Commission subsequently changed "*maître de sa compétence*" to "*juge de sa compétence*" and excluded the word "widest."⁹ Rather than injuring international arbitration and adjudication, both the Commission and the General Assembly thus made a substantial contribution to the effectiveness of international arbitration. For, as the commentary to the draft put it:

It is not the fact alone that the *compromis* may provide that the award is binding on the parties which makes it so binding. The view of States that international law makes an arbitration award binding, the circumstance that the tribunal faithfully has adhered to the fundamental principles of law governing its proceedings, these are the ultimate sources of the binding authority of an international arbitral award. States are required to take all necessary measures to carry into effect an award so rendered.¹⁰

In the final analysis, it is law that is the major factor in enforceability.

⁷ 7 UN GAOR Supp. (No. 9) at 7, UN Doc. A/2163 (1952).

⁸ I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPÉTENCE DE LA COMPÉTENCE 11 (1965).

⁹ See [1958] 1 Y.B. INT'L L. COMM'N 43-46, UN Doc. A/CN.4/SER.A/1958; for a concise summary of the debate, see I. SHIHATA, *supra* note 8, at 11 and n.4.

¹⁰ Commentary, *supra* note 6, at 105.

The late Professor Scelle, the rapporteur of the *projet*, though rebuked on this point, was hardly insensitive to the problem of excess of jurisdiction. He included a provision and a procedure for it in the *projet*.¹¹ The commentary prepared by the Secretariat observed:

An international tribunal is not a court of general jurisdiction nor is it a court free from the established rules of law governing any judicial proceeding. The jurisdiction of the tribunal is determined by the agreement of the parties; it may decide only the questions submitted to it. The tribunal must decide under the rules of law applicable to it. It must conduct its proceedings in a judicial manner and with due observance of the fundamental rules of procedure.¹²

Thus, in its notice of January 18, 1985, the United States was not inventing, but invoking, a recognized legal doctrine inherent in the very notion of an international tribunal. Before rushing to condemn the United States for its notice of withdrawal, the reader may find it appropriate to examine, in terms of that classic theory, the Judgment that precipitated it.

II.

Fourteen of the 16 judges sitting in *Nicaragua* found that the Court had jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, insofar as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956 on the basis of Article XXIV of that treaty.¹³

Article XXIV(2) of the FCN Treaty provides: "Any dispute between the Parties as to the interpretation or application of the present Treaty not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice unless the Parties agree to settlement by some other specific means."¹⁴ One of the judges who dissented from the Court's holding on this ground found that there had been no negotiations.¹⁵ The majority, for some reason not apparent on the face of the Judgment, ignored Article XXI(1)(d) of the Treaty, which provides: "The present Treaty shall not preclude the application of measures: . . . (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests. . . ."¹⁶ In the face of such explicit language, it is difficult to see how any tribunal could

¹¹ Art. 30, *id.*

¹² *Id.*

¹³ 1984 ICJ REP. at 442, para. 113.

¹⁴ *Id.* at 427, para. 81.

¹⁵ Separate Opinion of Judge Ruda, *id.* at 452, 454, para. 12.

¹⁶ Emphasis added. Judge Nagendra Singh was able to dispel for himself any lingering disquiet on this point by finding significance in the fact "that the jurisdictional clause of Article XXIV of the Treaty does not specify the exclusion of Article XXI from the Court's jurisdiction." Separate Opinion of Judge Nagendra Singh, *id.* at 444, 446-47.

use the Treaty to subject to its own jurisdiction matters that had been expressly excluded.

A smaller, but still substantial, majority of 11 judges concluded that the jurisdictional requirements of Article 36(2) of the Statute of the International Court of Justice were fulfilled by the interlocking and sufficiently congruent Declarations of Nicaragua and the United States.¹⁷ Nicaragua, in 1929, had submitted a communication that was the first step in making a unilateral declaration of unconditional submission to the jurisdiction of the Court when it signed the Protocol. But it never submitted the requisite ratification, despite the fact that it was duly notified that this deficiency rendered its effort at making a declaration nugatory.¹⁸ Indeed, Nicaragua itself seems to have been aware of the problem, for it had not relied on that stillborn communication in its own adjudication with Honduras in the International Court in 1960, preferring instead a special agreement under Statute Article 36(1).¹⁹

Yet the Court found that the incomplete communication of 1929 had been completed, repaired and transformed into a declaration by virtue of Article 36(5) of the Statute of the International Court.²⁰ That provision²¹ had been designed to transfer to the new Court declarations that had been made with regard to the Permanent Court of International Justice and that were still in force. The majority of 11 judges accomplished this feat by characterizing the 1929 communication (which could not, under the terms of the instrument with regard to which it was submitted, be a declaration) as a "declaration"²² and by concluding that this "declaration" was valid but not binding. They then interpreted Article 36(5) as having been designed to transform and render binding such theretofore uncompleted and defective "declarations."²³

In fact, the legislative history of the Court's Statute indicates unmistakably that this was not the intention of the transitional regime created by Article 36(5). The subcommittee of the Committee of Jurists, meeting in Washington in 1945, was quite explicit: "The subcommittee calls attention to the fact that many nations have heretofore *accepted* compulsory jurisdiction under the 'optional clause'. The subcommittee believes that provision should be

¹⁷ *Id.* at 442, para. 113.

¹⁸ *Id.* at 403-04, para. 25.

¹⁹ Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (*Hond. v. Nicar.*), 1960 ICJ REP. 192 (Judgment of Nov. 18).

²⁰ 1984 ICJ REP. at 404-08, paras. 27-35.

²¹ Article 36(5) provides:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

²² 1984 ICJ REP. at 403-04, para. 25.

²³ *Id.* at 405-08, paras. 29-35. For confirmation of its interpretation, the Court relied on the "conduct" of international organizations (*id.* at 408-09, para. 36). For an examination of the fallacy in this reasoning, and its implications, see M. Reisman, *Dissemination of Information by International Organizations: Reflections on Law and Policy in the Light of Recent Developments*, VICT. U. WELLINGTON L.J. (forthcoming).

made at the San Francisco Conference for a special agreement for continuing these acceptances *in force* for the purpose of this Statute.”²⁴

A majority of 11 on the Court found that the 6-month clause present in the U.S. Declaration, but absent in the now validated Nicaraguan one, bound the United States and defeated its efforts to terminate or modify its Declaration with immediate effect.²⁵ As for the restriction in the U.S. Declaration of matters coming under multilateral treaties, the Court dismissed it on the ground that even though the claims of Nicaragua may now have been enshrined in the texts of conventions, they originally derived from customary and general international law.²⁶ Some of these latter findings, while certain to generate scholarly and policy dispute, are not inconsistent with prior jurisprudence. Others are very problematic. But the Court’s creation of a valid Nicaraguan declaration is so ill-founded in the facts, in the law and in the Court’s own jurisprudence as to constitute a ground of nullity. In international law, as elsewhere, it takes two to tango. Hence, even if the Court could properly find that an appropriate U.S. declaration was in force, it should still have found itself without jurisdiction in this case.

All of the judges rejected the United States arguments of admissibility.²⁷ In a fragile international political system that seeks to protect itself by insulating matters of vital interest to the major powers from review *even by the Security Council*, it is arguable, of course, that those very states which sought such insulation may still submit themselves to a decisional entity that has no special mechanisms for protecting their interests. But surely a prudent tribunal would look for a high degree of clarity in the waiver of those very rights which international law has vouchsafed them. It is not the finding of admissibility of issues *in abstracto* in this case that is puzzling, but its finding when all of the other grounds of jurisdiction are so tenuous and forced.

Nor was this case free from some disquieting procedural pathologies. El Salvador, which had sought to intervene under Article 62 of the Statute, was denied that option by the Court. The decision itself tells us little.²⁸ More significant is the fact that El Salvador was denied a hearing on the matter.²⁹ The Friendship, Commerce and Navigation Treaty, on which 14 judges relied to find jurisdiction, had not been invoked by Nicaragua in its original Application and was scarcely discussed during the oral proceedings. Indeed, Judge Oda, in his separate opinion, remarked that there was but a single reference to it by the Agent of Nicaragua as “a subsidiary basis for the

²⁴ Doc. Jurist 41, G/31, 14 UNCIO Docs. 289 (1945) (emphasis added), *cited in* Dissenting Opinion of Judge Schwebel, 1984 ICJ REP. at 558, 571, para. 18, and Separate Opinion of Judge Jennings, *id.* at 533, 536.

²⁵ 1984 ICJ REP. at 421, para. 65.

²⁶ *Id.* at 424, para. 73.

²⁷ *Id.* at 429–41, paras. 84–108.

²⁸ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Order of Oct. 4).

²⁹ See Separate Opinion of Judges Ruda, Mosler, Ago, Jennings and de Lacharrière, *id.* at 219.

Court's jurisdiction."³⁰ The "unduly short time" allowed the judges to prepare and expand separate and dissenting opinions was also noted.³¹ The unusual haste was particularly puzzling, as interim measures, largely accomplishing the basic remedy sought by the applicant, had already been ordered against the defendant.³²

Even a review as summary as this indicates that the United States grievance that the Court's finding of its jurisdiction "is contrary to law and fact" was far from implausible.

III.

Whatever one's views of the merits of the political controversy dividing the United States and Nicaragua, it is well to remember that the International Court must continue to operate after this dispute is resolved and *Military and Paramilitary Activities* slips deeper and deeper into the lengthening crimson queue of *ICJ Reports*. In this longer view, one criterion of appraisal of each of the Court's judgments and opinions is its constitutive impact on the international judicial function itself,³³ a ubiquitous and inescapable consideration that is only sometimes treated explicitly.³⁴ The performance of that function depends on the confidence of states; the loss of that confidence poses the gravest threat to this institution. The point has never been put better than in Chief Justice White's dictum:

Discretion or compromise or adjustment, however cogent might be the reasons which would lead the mind beyond the domain of rightful power, and however much they might control if excess of authority could be indulged in, can find no place in the discharge of the duty to arbitrate a matter in dispute according to the submission and to go no further. No more fatal blow could be struck at the possibility of arbitration for adjusting international disputes than to take from the submission of such disputes the element of security arising from the restrictions just indicated.³⁵

Fidelity to procedures is an important communication to states in this regard, for, as Judge Koretsky put it, in international adjudication, they are not "simply technical. . . . Their strict observance in the International Court of Justice . . . is even more important than in national courts."³⁶ It is difficult

³⁰ Judgment of Nov. 26, Separate Opinion of Judge Oda, "Opening Remarks," 1984 ICJ REP. at 471, 472.

³¹ E.g., by Judge Oda, *id.*

³² *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Provisional Measures, 1984 ICJ REP. 169 (Order of May 10). See, in this regard, Reisman, *Accelerating Advisory Opinions: Critique and Proposal*, 68 AJIL 648 (1974).

³³ W. M. REISMAN, *supra* note 4, at 861.

³⁴ Case concerning the Northern Cameroons (Cameroon v. UK), Preliminary Objections, 1963 ICJ REP. 15, 65 (sep. op. Spender, J.) and 97 (sep. op. Fitzmaurice, J.) (Judgment of Dec. 2).

³⁵ 1914 FOREIGN RELATIONS OF THE UNITED STATES 1000, 1014, *cited in* K. CARLSTON, *supra* note 4, at 64.

³⁶ Northern Cameroons, Declaration of Judge Koretsky, 1963 ICJ REP. at 39, 40.

to avoid the impression that in the Judgment of the Court of November 26, 1984, its image of probity and its record of fidelity to the intentions of those states which have entrusted to it a general commitment to adjudicate were seriously injured.

The political and human impulse to get involved in a controversy like this is understandable. But before yielding to it, one would do well to reflect again on the words of Secretary of State Root, instructing the American delegates to the Hague Conference of 1907, at the very dawn of modern international adjudication:

There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation that would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process.³⁷

The United States, by its withdrawal of January 18, 1985, has not helped the Court. Nor will the Court be helped by the termination of the United States Declaration and probable emendation of the declarations of other states, now made necessary by the novel and expansive jurisprudence implicit in the Judgment of November 26, 1984. But before condemning the United States for what appears to be a retreat from international adjudication and before greater injury is done to international adjudication, international lawyers might do well to read the Judgment again in the light of the classic theory of public international jurisdiction. For it is an affirmation and not a repudiation of law to reject a decision by a tribunal that had no jurisdiction to make such a decision.

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³⁷ Instructions to the American Delegates to the Hague Conference, May 31, 1907, 1907 FOREIGN RELATIONS OF THE UNITED STATES, pt. 2, at 1128, 1135.

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